NOS. 84-237, 84-238 and 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*,
Appellants,

v.

BETTY-LOUISE FELTON, *et al.*,
Appellees.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,
Appellees.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR APPELLANT CHANCELLOR

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A. Appellee's thesis that remedial services funded pursuant to Title I need not be provided to educationally deprived children who are students at religious affiliated schools is without legal basis.

In apparent recognition that the provision of Title I remedial services to educationally deprived students at New York City's religious affiliated schools, off the site of such schools, is not an efficient means for accomplishing the purpose of such federal aid, appellees urge that the benefits of Title I may be limited to students at New York City's public schools. App. Br., pp. 15, 17, 23-25. Indeed, appellees claim that this Court need not "strike down [Title I]" because the funds now used to provide services to students of religious affiliated schools may be used for other students who attend public schools. *Id.*, p. 23. According to appellees, the Constitution requires that educationally deprived students be denied the remedial and counseling assistance provided by Title I merely because their parents have chosen to enroll them in schools affiliated with churches or synagogues.

Whether or not Congress could properly refuse to extend the remedial education benefits of Title I to students at religious affiliated schools (*see Pierce* v. *Society of Sisters,* 268 U.S. 510 [1925]), appellees' thesis is inconsistent with the concept of accommodation of religions restated in recent decisions of this Court. *See, Lynch* v. *Donnelly,* —— U.S. ——, 104 S. Ct. 1355, 1359 (1984), *reh. den.,* —— U.S. ——, 104 S. Ct. 2376 (1984). Such result is not mandated by the Establishment Clause. Furthermore, contrary to appellees' claim, Title I and regulations promulgated thereunder mandate that eligible students in nonpublic schools receive Title I assistance and that per-capita expenditures for public and nonpublic students be equivalent. 20 U.S.C. §3806(a); 34 C.F.R. §§200.70 and 200.71

(1984); *see also, Wheeler* v. *Barrera*, 417 U.S. 402 (1974), *mod.*, 422 U.S. 1004 (1975). Accordingly, the Board of Education is not empowered to discriminate against nonpublic school students and transfer funds intended for the nonpublic school program to the Board's public school Title I program. Rather, appellees' argument merely underscores the mischief traceable to their absolute First Amendment arguments.

B. Appellees have failed to show that the Board of Education's Title I program has a primary effect of either advancing or inhibiting religion.

Appellees contend not merely that the presence of Board of Education personnel in religious affiliated schools has a primary effect of advancing religion, but also of inhibiting it. App. Br., pp. 26-29. The claimed inhibition of religion, apparent to no other party to the litigation, is totally unsupported. The removal of religious fixtures from Title I classrooms, far from being a violation of the First Amendment, is minimally intrusive and a proper accommodation of the respective interests of Church and State. App. Br., pp. 26-27. Similarly, there is no record evidence to support appellees' speculation that the religious affiliated schools in New York City have been desecularized for the purpose of obtaining federal aid. App. Br., p. 29. Finally, appellees' argument that federally-funded Title I programs should be taught by parochial school teachers is, to say the least, disingenuous. App. Br., pp. 27-28. While the main thrust of their brief urges adoption of a *per se* rule prohibiting the mere presence of public school teachers on the premises of religious affiliated schools, their suggested alternative is one having far more serious implications under the Establishment Clause.

As for appellees' argument that the Board's program has a primary effect of advancing religion, it is submitted that their brief reveals that any effect on religion is, at most, "remote". *See, Lynch* v. *Donnelly, supra,* 104 S. Ct. at 1364. While remediation has been successful in helping students at religious affiliated schools to overcome their educational problems, and may even, as appellees speculate, have had an incidental effect of enabling their classmates to "move ahead in their studies instead of being held back by the Title I student" (App. Br., p. 37), this indicates only that the Boards' Title I program has been successful in fulfilling the Congressional purpose of assisting all educationally deprived children, whether they be students at public or private schools. *See, Wheeler* v. *Barrera, supra,* 417 U.S. at 405-406. The fact that the administration and faculty of the nonpublic schools assist in identifying[1] students eligible for Title I assistance, and consult with the Title I teachers concerning the students' needs and progress, does not rise to the level of an Establishment Clause violation but rather serves to effectuate the purpose of Title I. App. Br., pp. 20, 37, 41, 42.

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[1] In light of the cultural and economic background of many educationally deprived children, and the statutory and regulatory criteria for eligibility (*see* Br. of Sol. Gen., p. 3), appellee's apparent suggestion that students should request Title I services is less than candid. App. Br., p. 41.

C. In seeking to show excessive entanglement, appellees have misconstrued the nature of the relationship between the Board's Title I teachers and the schools at which they teach.

The Court of Appeals, in holding that the Board of Education's program violates the Establishment Clause, relied on its findings of excessive potential entanglement; accordingly, that issue has been briefed by the various appellants and we will not reiterate those arguments here. However, in discussing entanglement, and throughout their brief, appellees make reference to the "close relationship" between the Title I teachers and the teachers and adminstrators of the religious affiliated schools. App. Br., pp. 12, 19, 37, 46. At one point, appellees appear to urge or at least imply that the Title I teachers violate the Board's instructions and become involved in team teaching. App. Br., pp. 11-12. The evidentiary material upon which appellees rely, contained in the Joint Appendix in excerpted form at pages 237 through 250, shows only that the Title I teachers and counselors maintain the kind of contact with the school administration and faculty necessary for effective remediation. There is no indication of any team teaching or any other improper cooperative activities between Title I teachers and nonpublic school teachers.

We would finally note in connection with appellees' request for a remand (App. Br., p. 49, n. 20), that the Court of Appeals in its opinion recognized that there is no dispute as to the basic facts of this litigation. Appendix to Jurisdictional Statement, p. 10a. Under the circumstances, it is respectfully submitted that there is no need for a remand.

CONCLUSION

The judgment of the Court of Appeals should be reversed, with costs. The judgment of the District Court granting summary judgment to defendants upon a declaration that Title I, as administered in nonpublic schools of New York City, does not offend the Establishment Clause of the First Amendment, should be reinstated.

Dated: New York, New York
November 27, 1984

Respectfully submitted,

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